

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Rates for Interstate Inmate Calling Services)	WC Docket No. 12-375
)	

PETITION FOR PARTIAL RECONSIDERATION

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SUMMARY

This Petition respectfully seeks reconsideration of limited aspects of the Commission's Second Report and Order and Third Further Notice of Proposed Rulemaking ("Second ICS Order"). That Order adopts rules regarding maximum interstate and intrastate inmate calling services ("ICS") rates and permits certain ancillary services charges at capped rates, while eliminating many other fees altogether. Although the Second ICS Order advances the cause of reforming a dysfunctional and abusive ICS market, it suffers from two critical, related flaws that will prevent the "comprehensive" ICS industry reform that the Commission seeks and which inmates and their families deserve. In addition, certain ambiguities with respect to the terms "mandatory fee," "mandatory tax," and "authorized fee" require clarification.

First, the Commission should reconsider the pernicious effect of continuing permissiveness regarding site commission payments. Having concluded that site commission payments were the primary cause of the ICS industry's dysfunction and the excessive rates and charges that consumers have long been forced to pay, and despite signaling it would prohibit such payments altogether, the Commission inexplicably permits them to continue in the Second ICS Order. This creates a multifaceted problem, most significantly threatening the legal integrity of the Order. Moreover, the failure to prohibit site commissions offers ICS providers and correctional professionals virtually unlimited opportunities to generate revenues for the payment of commissions in new and nefarious ways. Because the Second ICS Order's rate caps may not, in the aggregate, yield providers sufficient funds to pay existing site commissions to facilities (especially in smaller, less profitable jails), new and increased charges on unregulated services can be anticipated, and, indeed, are almost certain.

Second, the Commission should reconsider a related flaw in the Second ICS Order — the Commission’s decision not to mandate a modest, per-minute facility cost-recovery fee that would be added to the rate caps. The record suggests that correctional facilities incur some security and administrative costs related to the provision of ICS (although genuine questions remain as to the extent of those costs). As an alternative to site commissions, the FCC should reconsider the proposal, endorsed by some inmate advocates, facilities, and providers alike, to replace the site commissions system with a modest, mandated cost-recovery mechanism. Such a mechanism could provide a very real incentive for correctional authorities to encourage increased minutes of use, it would drive down ICS rates over the long-term, and it would increase business for ICS providers. In that way, the perverse and destructive practices that have grown out of permissiveness toward site commissions could at last be terminated and reversed.

Third, and finally, to eliminate (or at least reduce) the possibility for mischief by providers and facilities, the Commission should clarify the meaning of the terms “mandatory fee,” “mandatory tax,” and “authorized fee” as they are used in Second ICS Order. The Commission should also clarify that ICS providers cannot circumvent the Second ICS Order’s rule regarding charges for single-call services through the use of unregulated subsidiaries to serve as the companies that charge third-party transaction fees for such services.

Reconsideration of these limited aspects of the Second ICS Order will pave the way for the comprehensive reform that the Commission has promised, that ICS consumers deserve, and that the ICS industry needs, while also ensuring that facilities will continue to facilitate ICS and that providers will earn a reasonable return on their investments.

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PETITION FOR RECONSIDERATION

This petition is filed pursuant to Section 1.429 of the Commission’s Rules, respectfully seeking reconsideration of limited aspects of the Commission’s Second Report and Order and Third Further Notice of Proposed Rulemaking¹ in the proceeding referenced above. Petitioner has previously filed comments in this proceeding urging the Commission to adopt comprehensive reform of the inmate calling services (“ICS”) industry — reform that addresses and regulates interstate and intrastate ICS rates and ancillary fees, and strictly limits or eliminates site commission payments.² Other parties to this proceeding have referred to rates, fees, and site commission payments (or, more broadly, facility compensation) as the “three-legged stool” upon which the ICS industry sits, arguing that comprehensive ICS reform cannot be achieved without regulation of all three of those legs.³ In its Second Further Notice of Proposed Rulemaking, the Commission, itself, acknowledged that a comprehensive reform effort would only prove successful if it “deal[t] with *all of the major portions* of the ICS market”⁴

The Commission is to be commended for action taken in the Second ICS Order to deal with two legs of the stool by reducing and capping interstate and intrastate ICS rates and

¹ Second Report and Order and Third Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, FCC 15-136 (rel. 5 November 2015)[Hereafter “Second ICS Order”].

² See generally, e.g., Letter from Michael S. Hamden to Hon. Mignon Clyburn, Commissioner, FCC, WC Docket No. 12-375 (23 September 2015).

³ See, e.g., Letter from Cherie R. Kiser, Counsel to GTL, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, *Ex Parte* Presentation and Attachment (21 August 2015)(arguing that dealing with the “three-legged stool” is necessary to achieve market-based reform and that ICS reform requires “simultaneous FCC action that establishes non-tiered backstop rate caps for all ICS rates, replaces site commissions with admin-support payments that reflect legitimate costs, and accepts the Joint Provider Reform Proposal backstop rate caps for ancillary charges.”).

⁴ Second Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, 29 FCC Rcd 13170, at ¶ 6 (2014)[Hereafter “Second Further Notice”](emphasis added).

eliminating most ancillary fees, while capping others at appropriate levels.⁵ Inmates and their families will benefit from the Commission's actions. However, in the absence of meaningful measures to address site commission payments, lasting reform will not be realized. Animated by runaway greed, ICS providers instituted an inducement to correctional facilities to enter into monopoly contracts through site commission payments, the cost of which was borne by end-users whose interests were entirely disregarded. Consequently, site commission payments to facilities rose to astounding levels in relatively short order. Then, to further enhance revenue and offset commission payments, ICS providers created a myriad of ancillary fees and charges, the most egregious of which were finally curtailed by the Second ICS Order. But, though the Commission has done much to ameliorate many abusive practices of the ICS industry, it has failed to address the central engine of distortion and dysfunction in the ICS industry.

Lasting, comprehensive reform of the ICS industry which ends the unconscionable exploitation of prisoners and their families absolutely depends upon the Commission's reconsideration of certain aspects of the Second ICS Order.

Most importantly, the Commission should reconsider the need to address that third leg of the stool — site commission payments. It should *prohibit payments to facilities in all forms*, thereby eliminating to the fullest possible extent the mechanisms by which providers and facilities can circumvent a prohibition on site commission payments. This will help protect inmates and their families from excessive charges for unregulated services (which are likely to be the source from which ICS providers create revenue to kickback to facilities if site commissions continue to be allowed). As suggested below, the Commission should alternatively consider whether facilities might justly be compensated for the actual costs they incur directly

⁵ See, e.g., Second ICS Order, at ¶ 9 (summarizing reforms).

related to ICS – and no other costs – through a modest facility cost-recovery fee as an additive to the rate caps. That could be expected to benefit inmates and their families by creating a genuine incentive for facilities to contract with providers offering to charge the lowest possible rates, while also increasing minutes of use, and putting downward pressure on the rate caps.⁶ The record suggests that prohibiting site commission payments and replacing them with a modest cost-recovery fee additive for facilities would create an Order supported by inmate advocates, correctional professionals, and ICS providers,⁷ perhaps encouraging those parties that are appealing the Second ICS Order to dismiss those claims.⁸ The net effect would be to maximize

⁶ See, e.g., Letter from Michael S. Hamden to Hon. Mignon Clyburn, Commissioner, FCC, WC Docket No. 12-375, at 6 (23 September 2015)(“A modest facility ‘cost recovery’ fee in the form of a small per-minute charge added to the rate caps would provide an incentive for facilities to seek the lowest possible calling rates. The lower rates would encourage increased minutes of use and thereby increase revenue to offset administrative costs. The net effect of this dynamic would be to force the market toward the \$.05 per minute rates that several advocates have urged.”).

⁷ See generally, e.g., Letter from Michael S. Hamden to Hon. Mignon Clyburn, Commissioner, FCC, WC Docket No. 12-375 (23 September 2015); Letter from Mary J. Sisak, Counsel to National Sheriffs’ Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (14 July 2015)(advocating for facility cost-recovery fee additive to rate caps in lieu of site commission payments); and e.g., Pay Tel Communications, Inc., *Ex Parte* Presentation, WC Docket No. 12-375 (15 October 2015)(discussing compromise proposal from ICS providers and likelihood that they would not appeal an Order adopting same). See also, e.g., Letter from Brian D. Oliver, CEO, Global*Tel Link, Corp.; Richard A. Smith, CEO, Securus Technologies, Inc.; Curt Clifton, Vice President of Government Affairs and Strategic Planning, Telmate, LLC; and Vincent Townsend, President, Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (15 October 2015).

⁸ See generally, e.g., Petition of Global Tel*Link for Stay Pending Judicial Review, WC Docket No. 12-375 (22 December 2015)[Hereafter “GTL Stay Petition”]; Securus Technologies, Inc., Petition for Partial Stay of Second Report and Order Pending Appeal (FCC 15-136), WC Docket No. 12-375 (22 December 2015); Petition of Telmate, LLC, for Stay Pending Judicial Review, WC Docket No. 12-375 (6 January 2016).

the chances that the meaningful, lasting reform that the Commission set out to achieve in the Second ICS Order⁹ will take effect without the delays and uncertainty that result from legal challenges.

I.

THE COMMISSION SHOULD RECONSIDER PROHIBITING OR REGULATING SITE COMMISSIONS

The Second ICS Order follows the action the Commission took in 2013 to reform ICS. The First ICS Order began to address one of the legs of the stool, ICS rates, but it only tackled interstate rates.¹⁰ The Second ICS Order builds upon that work, addressing two legs of the stool by regulating rates (this time both interstate and intrastate) and, for the first time, ancillary fees.¹¹

But effective, lasting ICS reform requires that the third leg — payments to facilities — must also be addressed. In the Second ICS Order, the Commission eschewed the prohibition of site commission payments.¹² Rather, the Commission concluded that while disfavored, site commissions could continue to be paid, presumptively (but not necessarily) derived from a portion of the rate caps that were set.¹³ In perpetuating site commission payments, the

⁹ Second Further Notice, at ¶ 6. In the Second Further Notice, the Commission explained: “We believe that this market-based approach is only possible through a comprehensive reform effort dealing with all of the major portions of the ICS market, unlike when the Commission addressed only interstate ICS in the [First] *Inmate Calling Report and Order and FNPRM*.” *Id.* Unfortunately, the same could be said of the Second ICS Order because it only addresses interstate and intrastate ICS and ancillary charges, but not site commission payments. For this reason, reconsideration of the Second ICS Order is imperative.

¹⁰ *See generally*, First Report and Order and Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Services*, WC Docket No. 12-375, 28 FCC Rcd 14107, and specifically ¶¶ 59-89 (2013)[Hereafter “First ICS Order”].

¹¹ *See, e.g.*, Second ICS Order, at ¶ 9 (summarizing adopted reforms).

¹² *Id.*, at ¶ 128.

¹³ *Id.*

Commission pitted the financial interests of ICS providers against those of correctional professionals, both of which are antithetical to those of the ultimate consumers – prisoners and their families. As a direct consequence: (1) facilities will continue to demand, and ICS providers will continue to pay site commissions, so the rate “caps” will become permanent, rather than backstop rates; (2) providers will likely use revenues generated from unfair charges to inmates and their families for *unregulated* products and services in order to pay excessive site commissions; and (3) some providers will be unable or unwilling to pay site commissions because the rate caps are set at or below cost,¹⁴ and ICS service in those facilities may be curtailed, especially in smaller, less profitable facilities.

The Commission’s approach puts in place a dynamic that is simply untenable.

A. The Commission should prohibit site commission payments.

The Commission should reconsider its decision that it need not prohibit site commissions in order to bring about comprehensive ICS reform.¹⁵ Previously, the Commission correctly came to the conclusion that “site commissions are the primary reason ICS rates are unreasonable and ICS compensation is unfair, and . . . such payments have continued to increase since [the First ICS] Order.”¹⁶ It explained that “site commissions ‘distort the ICS marketplace’ by creating incentives for the facilities to select providers that pay the highest site commissions, even if those

¹⁴ Access to the cost data submitted by the parties is not accessible to the public. However, since the rate caps were apparently established on the basis of average costs, and because the Commission collapsed the first two categories of jails together (0-99 and 100-349) to simplify the application of its caps, it seems that the applicable cap may be below cost for many jails in the 0-99 ADP category.

¹⁵ Second ICS Order, at ¶ 118 (“We conclude that we do not need to prohibit site commissions in order to ensure that interstate rates for ICS are fair, just, and reasonable and that intrastate rates are fair.”).

¹⁶ Second Further Notice, at ¶ 21. The Commission repeated this finding time and again in the Second Further Notice. *See, e.g., id.* at ¶¶ 3, 20, 24, and 30.

providers do not offer the best service or lowest rates.”¹⁷ The Commission went so far as to “predict that prohibiting such payments will enable the market to perform properly and encourage selection of ICS providers based on price, technology, and services rather than on the highest site commission payment.”¹⁸ And, in the Second ICS Order, the Commission wisely defined “site commission” broadly to include in-kind payments and “any form of monetary payment,” including other kinds of compensation,¹⁹ implicitly acknowledging the practice of ICS providers to exploit loopholes in order to win ICS contracts. That definition establishes a framework that could prevent ICS providers (and facilities) from profiteering on unregulated products that are far removed from ICS services.

There is no real dispute that the Commission has the legal authority to prohibit site commission payments.²⁰ So, given the pernicious nature of this industry-created, perverse incentive, the Commission’s action seems inexplicable. Instead of banning site commissions entirely, the Second ICS Order merely discourages such payments.²¹

ICS providers are already arguing that aspects of the Second ICS Order should be stayed and ultimately overturned on appeal, in significant part, because the Commission’s decision to perpetuate site commissions may be legally infirm.²² GTL, for example, argues that the

¹⁷ Second ICS Order, at ¶ 122.

¹⁸ Second Further Notice, at ¶ 21.

¹⁹ See 47 C.F.R. § 64.6000, Definitions, at ¶ (t). By prohibiting all compensation to facilities, ICS providers would be less likely to gouge inmates and their families on unregulated products in order to derive excess revenues to use in making payments to facilities.

²⁰ See, e.g., Letter from Andrew D. Lipman to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2-4 (21 September 2015)(setting forth arguments made repeatedly in this proceeding regarding the Commission’s authority to prohibit site commissions).

²¹ Second ICS Order, at ¶ 131.

²² See, e.g., GTL Stay Petition, at 9-20.

Commission's treatment (or lack thereof) of site commission payments violates both Section 276²³ and the Administrative Procedure Act.²⁴

In addition to potential legal vulnerabilities, however, are the consequences the Commission's decision is likely to have for others vitally interested in this proceeding. History has proven that where regulatory loopholes exist, ICS providers and facilities will work together to exploit them to their benefit and to the detriment of prisoners and their families.²⁵ By permitting unrestricted payments from ICS providers to jails and prisons to persist, the Commission has left open the door for the kind of mischief and shenanigans that have corrupted this industry for decades.²⁶ The failure to prohibit site commissions will undermine a market-based price correction within the industry, it will eliminate selection of ICS providers on criteria other than the highest commission payment,²⁷ and it will likely exacerbate escalating consumer prices for unregulated products and services.

The Commission may be correct that the Second ICS Order should ensure that *interstate and intrastate ICS rates* will be fair, just, and reasonable, since “providers’ rates must comply

²³ 47 U.S.C. § 276; *See* GTL Stay Petition, at 11-12.

²⁴ 5 U.S.C. §551, *et. seq.*; *See* GTL Stay Petition, at 15-20. While the strength of GTL's position is uncertain, at best, the Commission could moot those arguments by reconsidering the Second ICS Order and prohibiting site commissions, instead instituting modest cost recovery for facilities through a per-minute additive to ICS rates.

²⁵ *See, e.g.*, Second ICS Order, at ¶ 154 (recognizing that some ICS providers used unregulated ancillary fees as a loophole to circumvent the intended impact of the interstate rate caps adopted in the First ICS Order); *id.*, at ¶ 131 (seeking comment on duration of any transition period to avoid abuse).

²⁶ Ironically, the Commission took pains to close “the potential for loopholes and gaming” through its regulation of ancillary service charges and third-party services, while at the same time ignoring the elephant in the room — site commissions — thereby leaving in place the most glaring threat to meaningful and lasting reform. Second ICS Order, at ¶ 9.

²⁷ Second Further Notice, at ¶ 21.

with [the Order's] rate caps, regardless of whether the provider pays site commissions."²⁸ Unfortunately, based on the Commission's prior experience in this docket, setting rate caps without prohibiting (or even limiting) commission payments will ensure that the rate caps become the permanent rates.²⁹ But that is not the worst of it. The Commission has underestimated the avarice of facilities and the sinister ingenuity of providers. The Commission's approach to site commissions can be summed up as follows: "providers can do whatever they want so long as they comply with the rate caps and ancillary fees rules."³⁰ The most vexing problem with this approach is that ICS providers and correctional professionals will find ways to preserve and promote their unholy alliance – most likely through the expansion of unregulated services such as video visitation and commissary accounts – and at the continuing expense and exploitation of prisoners and their families.

Almost immediately upon the Commission's release of its Fact Sheet summarizing the draft of the Second ICS Order,³¹ the American Jail Association (AJA) seized on the fact that the

²⁸ Second ICS Order, at ¶ 124 n.409. However, if site commissions can be derived solely from the established rate caps, one might question whether those rates are in fact "fair, just and reasonable" to consumers on the one hand, and if they cannot be, to ICS providers on the other.

²⁹ *See, e.g.*, Letter from Andrew D. Lipman to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 5 (21 September 2015) ("Experience shows that setting a maximum rate without separate limits on site commissions would lead to a 'race to the top.' Correctional facilities would continue to award contracts to whichever provider offered them the highest commissions, and the ICS providers would therefore be certain to charge the maximum authorized rate. Any provider who charged less would have less revenue available from which to pay site commissions, and therefore would be extremely unlikely to win any contracts.").

³⁰ Second ICS Order, at ¶ 139 ("[W]e do not dictate what an ICS provider can do with its profits and conclude that the most reasonable and fair approach is to leave it to ICS providers and facilities to negotiate the amount of any payments from the providers to the facilities, provided that those payments do not drive the provider's rates above the applicable rate cap.").

³¹ *See* FCC, Wireline Competition Bureau, "Fact Sheet: Ensuring Just, Reasonable, & Fair Rates for Inmate Calling," <https://www.fcc.gov/document/fact-sheet-ensuring-just-reasonable-fair-rates-inmate-calling> (30 September 2015).

Commission stated that it would discourage, *but not prohibit* site commissions. The AJA Alert conveyed this “180 degree reversal” as an opportunity for its members to continue seeking payments from ICS providers.³² And at least one ICS provider hastily sent out a mass mailing to its customers which mischaracterized the Final Order of 22 October 2015, stating that correctional facilities could receive continued funding through ICS services by adding a “Mandatory Fee” which could “be passed on to consumers.”³³ It should be of grave concern to the Commission that the Second ICS Order’s hands-off approach to site commissions is being seen by correctional professionals as a victory and that ICS industry leaders have already engaged in manipulation and machinations to maintain the *status quo*.

To be clear, providers may not be willing to pay kickbacks to all facilities, especially to smaller jails where profit margins are slim to begin with and/or facilities where providers do not offer unregulated services. In those facilities, rate-capped compensation may be inadequate and may well cause the reduction or elimination of access to ICS. But in facilities that are more desirable to serve (either because providers have unusually low costs, and/or because the ICS provider uses ICS as a loss leader and offsets lost profits through unregulated services in the facility), ICS providers will find ways to compete for and win exclusive contracts. Regrettably, the Second ICS Order allows them to do so through “the main cause of the dysfunction of the ICS marketplace”³⁴ — site commission payments.

³² See, e.g., Letter from Andrew D. Lipman to Marlene H. Dortch, Secretary, FCC, Attachment A, WC Docket No. 12-375 (5 October 2015)(attaching American Jail Association Alert: “FCC proposed tiered ICS rates for jails; commissions allowed” (2 October 2015)).

³³ See *Ex Parte* Submission of Martha Wright Petitioners, Attachment B, WC Docket No. 12-375 (20 November 2015)(attaching 13 November 2015 Memorandum from Securus Technologies to “Valued Customers.”).

³⁴ Second Further Notice, at ¶ 24.

Concern has been expressed that the Commission’s rate caps have been set at, or even below providers’ aggregate costs.³⁵ To the extent that is true, site commission payments are unlikely to be derived from interstate and intrastate rate revenues. And, if providers cannot pay commissions out of ICS revenues, they will most likely seek to provide continued site commission payments through new and higher charges and fees on unregulated services and products that they offer to inmates and their families, including video visitation, trust fund and commissary payment fees, and other technology services. In fact, some of those practices already exist and have been identified as emerging areas of exploitation.³⁶ The Commission acknowledged these practices — this gamesmanship — in the Second ICS Order,³⁷ yet it failed to address the effect these practices will have on perpetuating unjustified site commission payments.

Instead, the Commission concluded that it did “not need to prohibit site commissions in order to ensure that interstate rates for ICS are fair, just, and reasonable and that intrastate rates are fair.”³⁸ The Second ICS Order’s rates may well be fair. But the Commission’s conclusion fails to account for the probability that ICS providers will increase charges for any number of unregulated products and services to offset their continued site commission payments.

³⁵ Second ICS Order, Dissent of Commissioner Ajit Pai, at 203-06 [Hereafter “Pai Dissent”].

³⁶ *See, e.g.*, Human Rights Defense Center, Comments, at 14, WC Docket No. 12-375 (12 January 2015)(there is “clear evidence that the video communications market is currently driven by the same perverse incentives that caused market failure in the correctional telephone industry”); *see also, e.g.*, Prison Policy Initiative, “Screening Out Family Time: The for-profit video visitation industry in prisons and jails,” at 12 (January 2015), <http://www.prisonpolicy.org/visitation/report.html> (explaining the practice of subsidizing the cost of video visitation equipment by charging inmates and their families high fees to deposit monies into commissary accounts)(last accessed 16 January 2016).

³⁷ *See, e.g.*, Second ICS Order, at ¶¶ 296 and 306(expressing concern about, and seeking comment regarding extent of gamesmanship already at play in the video visitation marketplace).

³⁸ *Id.*, at ¶ 118.

ICS providers “gamed” the interstate rate rules in the First ICS Order by recovering site commission payments through then-unregulated intrastate rates and ancillary fees.³⁹ It should be assumed that the pressurized dynamic created by the rate caps, coupled with the continuing availability of site commission payments, will drive ICS providers to subsidize ever escalating commissions with new and increasing fees imposed on unregulated services. In fact, some of them are already doing so.⁴⁰ Inmates and their families will, in effect, be left shouldering the burden of the cozy and exploitative alliance that was the genesis of unconscionable abuses in the ICS industry.

It is telling that the Commission can say no more than that it has “addressed the harmful effects of outsized site commissions by establishing comprehensive rate caps and caps on ancillary service charges that *may limit* providers’ ability to pass site commissions through to ICS consumers.”⁴¹ The use of such hedging language accurately summarizes Commission action, but it falls far short of the reform that is needed. The Commission should reconsider its position on this issue, prohibiting site commission payments altogether so that it can proudly announce that it has “addressed the harmful effects of outsized site commissions by establishing

³⁹ *Id.*, at ¶ 128 n.437 (“These comprehensive reforms leave less room for entities to seek to ‘game’ the rules by, for example, attempting to recover site commission payments through intrastate rates that were not subject to our interim rate caps.”).

⁴⁰ *See generally, e.g.*, Michael S. Hamden, *Ex Parte* Presentation, “Integrated Services,” WC Docket No. 12-375 (8 July 2015)(arguing that unregulated products and services offer ICS providers with new platforms thorough which to exploit inmates and their families); *see also id.* at 7 (mentioning Securus’ acquisition of JPay, Inc., its subsidiary that charges third-party financial transaction fees, including hefty charges for so-called single-call services).

⁴¹ Second ICS Order, at ¶ 128.

comprehensive rate caps and caps on ancillary service charges that” *will eliminate* “providers’ ability to pass site commissions through to ICS consumers.”⁴²

B. As an alternative to site commissions, a facility cost-recovery fee should be reconsidered.

The Commission’s decision to perpetuate site commission payments may have been premised upon a concern that correctional facilities may incur some legitimate costs in connection with the provision of ICS services. There is legitimate debate regarding the nature and extent of those costs, but it seems clear that facilities do incur *some* administrative and security costs that would not exist but for ICS.⁴³ Indeed, the record “makes clear that facilities incur actual costs that are directly and incrementally attributable to increased access to inmate calling services. The only dispute is the amount of those costs”⁴⁴

The record provides little clarity regarding the precise amount of facilities’ costs, partly due to the failure of correctional professionals to provide reliable measurements based upon a consistent and legitimate cost allocation methodology,⁴⁵ and also because of the inherent variability of correctional facilities. Indeed, the tiered rate caps which were adopted by the

⁴² *Cf., id.*, at ¶ 128 (“addressed the harmful effects of outsized site commissions by establishing comprehensive rate caps and caps on ancillary service charges that *may limit* providers’ ability to pass site commissions through to ICS consumers.”)(emphasis added).

⁴³ *See, e.g.*, Letter from Michael S. Hamden to Hon. Mignon Clyburn, Commissioner, FCC, WC Docket No. 12-375, at 6 (23 September 2015)(“It is self-evident, and the record supports the notion that confinement facilities incur some costs in connection with providing ICS, as they do in the provision of other programs and services.”)(citing *Inmate Calling Report and Order and FNPRM*, 28 FC Rcd at 14134-35, nn.196, 203)). *See also, e.g.*, Second ICS Order, at ¶ 135 n.473.

⁴⁴ Pai Dissent, at 205.

⁴⁵ *See, e.g.*, Second ICS Order, at ¶ 42 (seeking comment on significant variations and underlying assumptions on widely divergent cost estimates in the provision of ICS); and ¶ 52 (questioning accuracy of cost allocation methodology).

Commission⁴⁶ demonstrate the recognition that there are significant variations in the operational costs of providing ICS, especially in smaller jails.

Thus, some mechanism that will permit an offset to the cost of providing ICS may be appropriate. Such an approach would be consistent with the Commission's aims in this proceeding, to "promote the widespread deployment" of ICS,⁴⁷ and to foster rehabilitation and family unity by making it easier for inmates to stay connected to their families and friends.⁴⁸

C. The adoption of a facility cost-recovery fee might hasten a final resolution of all the matters addressed in the Second ICS Order.

The idea of a modest cost-recovery mechanism has gained meaningful support from a broad range of interested parties. ICS providers, law enforcement, a state regulator, and some in the inmate advocacy community have been proponents of an Order prohibiting site commissions and establishing instead a small cost-recovery fee additive.⁴⁹ Remarkably, four ICS providers (including the three largest), endorsed reform under which "the existing site commission system

⁴⁶ See, Second ICS Order, at ¶ 22.

⁴⁷ 47 U.S.C. § 276(b); Second ICS Order, at ¶ 109.

⁴⁸ Second Further Notice, at ¶¶ 1-2.

⁴⁹ See, e.g., Letter from Brian D. Oliver, CEO, Global*Tel Link, Corp.; Richard A. Smith, CEO, Securus Technologies, Inc.; Curt Clifton, Vice President of Government Affairs and Strategic Planning, Telmate, LLC; Vincent Townsend, President, Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (15 October 2015)(endorsing replacement of the existing site commission system with a limited cost-recovery fee rate additive); Letter from Marcus W. Trathen, Counsel to Pay Tel, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (15 October 2015)(discussing reform supported by GTL, Securus, Telmate and Pay Tel that would have adopted the rate caps in the Fact Sheet but provided for an "explicit per-minute admin-cost recovery fee as an additive to ICS rates" and a prohibition on commission payments); Letter from Mary J. Sisak, Counsel to National Sheriffs' Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (14 July 2015)(advocating facility cost-recovery fee additive to rate caps in lieu of site commission payments); Letter from Darrell Baker, Director, Utility Services Division, Alabama Public Service Commission, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 (13 July 2015)(advocating cost recovery fee); and Letter from Michael S. Hamden to Hon. Mignon Clyburn, Commissioner, FCC, WC Docket No. 12-375, at 5-8 (23 September 2015).

would be replaced with and limited to a capped, per-minute admin-support payment based on average daily population that would be an additive to the” Second ICS Order’s rates.⁵⁰ Unlike the incentives inherent in a system based on the payment of site commissions (which places upward pressure on the rate caps), a modest cost-recovery mechanism would motivate facilities to seek lower rates and better services to increase minutes of use and revenue.⁵¹ As a result, inmates and their families would ultimately pay less, even factoring in a small recovery additive.⁵²

Perhaps of equal importance to lasting reform, adoption of a facility cost-recovery mechanism would diminish the likelihood of successful legal challenges to the Second ICS Order. The chief executive officers of the most dominant ICS providers offered a conditional pledge that their companies would forego a legal challenge to an order that “(a) adopts the rate

⁵⁰ Letter from Brian D. Oliver, CEO, Global*Tel Link, Corp.; Richard A. Smith, CEO, Securus Technologies, Inc.; Curt Clifton, Vice President of Government Affairs and Strategic Planning, Telmate, LLC; and Vincent Townsend, President, Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (15 October 2015).

⁵¹ *See*, Letter from Michael S. Hamden to Hon. Mignon Clyburn, Commissioner, FCC, WC Docket No. 12-375, at 6-8 (23 September 2015). The Prison Policy Initiative also endorses a cost-recovery proposal in lieu of a hands-off approach to site commission payments. *See*, Prison Policy Initiative, “What can states do after the FCC has ruled?,” <http://www.prisonpolicy.org/blog/2015/10/21/states-after-fcc/> (21 October 2015)(advocating that states enact a statutory, per-minute ceiling on site commission payments to facilities; and further suggesting that a three cent per-minute cap would “give facilities an incentive to push the rates down in order to increase usage”).

⁵² *See, e.g.*, Letter from Andrew D. Lipman to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 7 (7 October 2015)(“[E]liminating the competition-distorting role site commissions play in the marketplace should enable correctional institutions to prioritize lower rates and higher service quality as decisional criteria in their RFPs, thereby giving ICS providers an incentive to offer the lowest end-user rates.”).

caps and fees stated in the Fact Sheet, and (b) establishes a maximum facility admin-support payment in the form of a per-minute, capped additive rate . . .”⁵³

Even in the absence of absolute certainty regarding a fact-based assessment of actual facility ICS administrative costs, the Commission can make a rational decision as to the appropriate amount based on the record as it stands, while gathering more comprehensive data and continuing to study the issue. The lack of perfectly accurate data (which can certainly be improved with time and further collection) does not preclude a rational cost recovery mechanism and a legally sustainable Order.

For all of these reasons, the Commission should reconsider its approach to site commissions and administrative cost recovery in the Second ICS Order.

II.
THE COMMISSION SHOULD CLARIFY THE TERMS
“AUTHORIZED FEE,” MANDATORY TAX,” AND “MANDATORY FEE”
TO PREVENT CIRCUMVENTION OF THE NEW RULES

There has been confusion regarding the Commission’s definition in the Second ICS Order of “mandatory fee,” “mandatory tax,”⁵⁴ and what fees and taxes the Commission intended to include as permissible under those terms. At least one ICS provider, Securus, represented to its customers that the Commission intended to allow correctional facilities “the ability . . . to get a Mandatory Fee authorized and assessed, over and above the rate cap, that can be passed on to

⁵³ Letter from Brian D. Oliver, CEO, Global*Tel Link, Corp.; Richard A. Smith, CEO, Securus Technologies, Inc.; Curt Clifton, Vice President of Government Affairs and Strategic Planning, Telmate, LLC; and Vincent Townsend, President, Pay Tel Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375, at 2 (15 October 2015).

⁵⁴ 47 C.F.R. § 64.6000(n) (defining “Mandatory Tax or Mandatory Fee”); *see also* 47 C.F.R. § 64.6000(b) (defining “Authorized Fee”).

consumers . . .” in order to “off-set . . . costs related to inmate calling and investigations . . .”⁵⁵ Securus opined that, in permitting “mandatory taxes” and “mandatory fees,” the Order created an “approved and legal way for [correctional facility clients] to continue to generate some level of funding through inmate calling services.”⁵⁶

Within days, the Wireline Bureau responded directly to Securus, characterizing Securus’ statements as “inaccurate and misleading,” and pointing out that the Commission had not authorized “correctional facilities to continue collecting site commissions” through the artifice of a Mandatory Fee.⁵⁷

At a minimum, as it reconsiders the Second ICS Order, the Commission should clarify exactly what fees and taxes are permitted pursuant to the definitions of “mandatory fee,” “mandatory tax” and “authorized fee.”⁵⁸

III.

THE COMMISSION SHOULD CLARIFY THAT THE SECOND ICS ORDER’S SINGLE-CALL RULE MAY NOT BE CIRCUMVENTED BY UTILIZING UNREGULATED SUBSIDIARIES

The Commission should also clarify, and perhaps reconsider, the aspect of the Second ICS Order that pertains to permissible charges for so-called single-call services to ensure that certain ICS providers cannot continue to use them as an “end-run” around the rules⁵⁹ or as a

⁵⁵ Letter from Robert Pickens, President, Securus Technologies, Inc. to Clients (13 November 2015)(filed in WC Docket No. 12-375 as Exhibit B to the Wright Petitioners’ 20 November 2015 filing).

⁵⁶ *Id.*

⁵⁷ Letter from Matthew S. DelNero, Chief, Wireline Competition Bureau, FCC, to Robert Pickens, President, Securus Technologies, Inc., WC Docket No. 12-375 (3 December 2015).

⁵⁸ For example, would an administrative recovery fee mandated and imposed by a local governmental body (*i.e.*, a county commission) constitute a “mandatory fee,” “mandatory tax,” or “authorized fee?”

⁵⁹ Second ICS Order, at ¶ 184 (reporting characterization of “several commenters”).

“backdoor avenue for ICS providers to further gouge their customers . . .”⁶⁰ The Commission properly characterized single-call services as “ancillary charges,”⁶¹ and accurately observed that single-call charges “inflate the effective price end users pay for ICS [which] result in excessive compensation to providers.”⁶² The Commission properly concluded that reform of single-call charges “is necessary and . . . it is appropriate to address unreasonable charges.”⁶³ It therefore adopted a rule allowing ICS providers to charge “the amount of the third-party financial transaction (with no markup) added to a per-minute rate no higher than the applicable rate cap.”⁶⁴

That rule, however, may not rectify the problem the Commission identified. As numerous *ICS providers* explained, some in the industry use unregulated subsidiaries as the so-called “third-parties” imposing the excessive financial transaction fees in the single-call context.⁶⁵ An argument could be made that the Commission’s single-call rule does not cap the amount that those affiliated third parties can charge for the financial transactions associated with such services. If the Commission’s rule can properly be interpreted to allow the unregulated subsidiary of an ICS provider to charge \$9.99 or \$14.99 *per single call*, with all monies ultimately flowing to the same parent ICS provider, then the rule must be reconsidered, as it will not stem the unreasonable charges customers are increasingly being assessed.

⁶⁰ *Id.*, at ¶ 187 n.672 (quoting the Wright Petitioners’ characterization of single-call “options”).

⁶¹ *Id.*, at ¶ 186.

⁶² *Id.*, at ¶ 187.

⁶³ *Id.*, at ¶ 186.

⁶⁴ *Id.*, at ¶ 187. *See* 47 C.F.R. § 64.6020(b)(2).

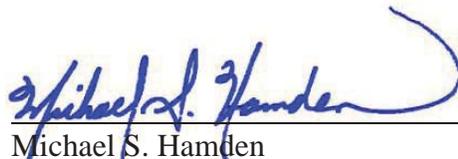
⁶⁵ *See, e.g.,* CenturyLink, *Ex Parte* Presentation, at 3, WC Docket No. 12-375 (15 October 2015)(“Providers can divert transactions to certain third party processors, claiming high fees charged by the third party. Where the processor is a direct affiliate or party to a revenue sharing agreement, the Commission should impose the same caps that would apply if the transaction were completed by the provider itself.”). *See, also,* Second ICS Order, at ¶ 185.

The Commission should clarify that its single-call rule does not provide such a loophole, or, if it does, then the rule should be reconsidered.

CONCLUSION

For all of these reasons, and if the Commission's objective to achieve meaningful, lasting ICS reform is to be fully realized, it is imperative that the Second ICS Order be reconsidered and clarified.

Respectfully submitted this 19th day of January, 2016.



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